

## REMARKS

### Remarks Regarding 35 U.S.C. §112 Rejections

Claims 27-29 and 31 stand rejected under the second paragraph of 35 U.S.C. §112. Applicant respectfully submits that the requested amendments to Claim 27 obviate the antecedent basis and claim scope issues noted by the Examiner in the Office Action. Furthermore, Applicant submits that Claims 27-29 and 31 are not anticipated by or obvious in view of any of the references of record and are otherwise in condition for allowance and such disposition is respectfully requested.

### Remarks Regarding 35 U.S.C. §102(e) Rejections

In accordance with the Office Action, Claims 13-26 stand rejected under 35 U.S.C. §102(e) based on the Examiner's conclusion that such claims are anticipated by United States Patent No. 6,747,917 to Jennings et al. (Jennings). Applicant submits that Jennings does not disclose each and every limitation of independent Claims 13 and 21 and therefore such claims are not anticipated by Jennings. For this reason, Applicant respectfully requests withdrawal of such rejection and allowance of Claims 13-26 in addition to the allowance of claims 27-29 and 31.

Jennings discloses a string of beads that includes one bead 102 of a first color representing the first day of menstrual bleeding, six beads 104 of a second color representing the early infertile days, twelve beads 106 of a third color representing fertile days, thirteen beads 108 of the second color representing later infertile days with one of the later infertile days beads 108 (the 27th bead 112 on the string) being provided in a fourth color that is different from the second color, and an optional thirty-third bead 110 signifying the end of the menstrual cycle. (See Figs. 1 and 2 and Col. 6, line 28 through Col. 8, line 59 of Jennings). Of note, the optional thirty-third bead 110 included in the loop 100 version of Jennings' device does not represent any of the days of the woman's menstrual cycle as Jennings' device is "suitable for use by women whose menstrual cycles last between 26 and 32 days" (Col. 7, lines 39-40) and such optional bead is not even included in the chain 200 version of Jennings' device (See Fig. 2).

Jennings specifically teaches that beads 102, 104, 106 and 108 should be the same size and shape (see Col. 7, lines 24-25 of Jennings). Jennings does mention that: "if the preferred shapes of beads are not locally available, other shapes can be used ... as long as a marker such as a ring is provided which can be moved from one bead to the next while remaining secure on the intended bead." (Col. 8, lines 4-9). This does not amount to a teaching that one of the thirty-two

beads 102, 104, 106 or 108 representing days of the woman's menstrual cycle may be shaped or sized differently from another one of the thirty-two beads 102, 104, 106 or 108. Rather, this merely implies that all of beads 102, 104, 106 and 108 may be shaped differently than the teardropped shaped beads 102, 104, 106 and 108 as shown in FIGS. 1, 1A, 1B and 2 of Jennings since, if one of beads 102, 104, 106 and 108 were too differently shaped or sized from the other of beads 102, 104, 106 and 108, then the ring would not be moveable from one bead to the other beads while remaining secure on all of the beads 102, 104, 106 and 108. In this regard, if the ring accidentally slips off a bead 102, 104, 106 or 108 or cannot be positioned on a bead 102, 104, 106 or 108 of Jennings' device, the user will lose track of where they are in the menstrual cycle thereby defeating the usefulness of Jennings' device. Furthermore, Jennings' mention that beads 102, 104, 106 and 108 may be consecutively numbered from 1 through 32 to provide "indicia other than color for indicating place in the cycle" (Col. 7, lines 52-55) does not amount to any teaching or suggestion that one or more of beads 102, 104, 106 and 108 are of two or more colors.

In contrast with Jennings, Claim 13 recites eight different beads. Of particular significance with respect to the disclosure of Jennings, Claim 13 specifically recites that the second beads are different in size than the first bead, that the third bead is of three colors and is differently sized than the second beads, that the fifth bead is of two colors, that the sixth beads are of two colors and are different in size than the fifth bead, and the eighth beads are shaped different from the seventh bead. Likewise, Claim 21 recites nine types of beads at least one of which is two or more colors and at least two of which are different in shape and/or size. For at least these reasons, Claims 13 and 21 are not anticipated or otherwise suggested by Jennings.

Additionally, Claim 21 recites an ovulation prediction kit for determining the day during a fertile phase of the woman's menstrual cycle when a level of luteinizing hormone released by the woman's pituitary gland surges, such surge being correlated with the day of a cervical mucus peak in the woman's menstrual cycle. Claim 21 also recites a ninth type of bead positioned on the string to visually indicate the day of the cervical mucus peak in the woman's menstrual cycle when the luteinizing hormone level surges based on a result from the ovulation prediction kit and removed from the string at the end of the woman's menstrual cycle. The passing reference in the background section of Jennings to the existing use of urinary progesterone metabolite measurements does not disclose the combination of a bead device with an ovulation prediction

kit providing such measurements. There is no mention anywhere in Jennings that Jennings' bead device be combined with an ovulation prediction kit providing such measurements.

Furthermore, Jennings does not disclose or suggest that any of the thirty-two beads 102, 104, 106 and 108 are positioned on the string of Jennings' device to provide a visual indication of the day of the woman's cervical mucus peak when the luteinizing hormone level surges based on a result from the ovulation prediction kit.

Furthermore, Jennings specifically teaches, in the case of the loop form of Jennings' device (FIG. 1) that the ends of the string, cord or wire be "knotted or securely fastened to prevent tampering, such that the beads cannot be removed and the order of the beads is preserved. Preferably, bead 110 surrounds the knot or other fastening." (See Col. 6, lines 54-57). Also, Jennings specifically teaches, in the case of the open-end linear form of Jennings' device (FIG. 2), that the ends of the string, cord or wire be "securely knotted or otherwise fastened at both ends 202, 204 to prevent tampering, such that the beads cannot be removed from chain 200 and the order of the beads is preserved." (See Col. 8, lines 22-26). Thus, Jennings specifically discloses a device that is configured to prevent removal of the beads. This is in contrast with Applicant's invention as recited in Claims 13, 21 and 27 wherein all of the beads are removed when the woman's menses phase concludes. Applicant's claimed invention is advantageous because it allows for positioning of the beads in desired numbers and orders to accommodate different menstrual cycles instead of moving a rubber band marker along a pre-configured set of beads each day as with the Jennings device. (See Jennings, Col. 7, lines 26-38 and Col. 8, lines 35-46). This difference is particularly notable in that the pre-configured necklace or chain of Jennings may not be appropriate for use by women having menstrual cycles falling outside of regular 26 to 32 day cycles. In fact, Jennings specifically acknowledges this at Col. 7, lines 46-51 and Col. 8, lines 47-59. Further, since all beads are easily removed with Applicant's claimed apparatus, the beads are ready to be used again to provide indications for the woman's next menstrual cycle, but not necessarily in the same order as the previous month thereby accommodating variations in the woman's cycle from month to month.

In view of the noted deficiencies of Jennings as a reference, Jennings does not anticipate Claims 13 and 21 and could not otherwise render the claimed apparatuses obvious in view of Jennings alone or in combination with other references. Since each of independent Claims 13 and

21 are allowable, there is no need to separately address the patentability of the respective claims depending therefrom.

Conclusion:

Based upon the foregoing, Applicant believes that all pending claims are in condition for allowance and such disposition is respectfully requested. In the event that a telephone conversation would further prosecution and/or expedite allowance, the Examiner is invited to contact the undersigned.

Respectfully submitted,

MARSH FISCHMANN & BREYFOGLE LLP

Date: September 22, 2008

By: /Robert B. Berube/  
Robert B. Berube  
Registration No. 39,608  
8055 E. Tufts Ave., Suite 450  
Denver, Colorado 80237  
Telephone: 303-770-0051  
Facsimile: 303-770-0152